Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Telecommunication Act of 1996	)	CC Docket No. 96-115
	)	
	)	
Telecommunications Carriers' Use Of Customer Proprietary Network Information and Other Customer Information	)	
	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149
	)	

COMMENTS OF SBC COMMUNICATIONS INC. TO PETITIONS FOR RECONSIDERATION OF THE THIRD REPORT AND ORDER

SBC Communications (SBC), on behalf of itself and subsidiaries, hereby files these comments in response to Verizon's Petition for Reconsideration[1] of the *Third Report and Order*[2] in the foregoing docket. SBC fully supports Verizon's request for preemption of any state rules that require carriers to obtain opt-in CPNI approval prior to using or sharing CPNI on an intra-company or joint venture basis.

As the history in the proceeding makes clear, an opt-in approach for CPNI consent has consistently raised First Amendment concerns. In the *Second Report and Order* in this proceeding,[3] the Commission adopted an opt-in approach, concluding that opt-in was sustainable under First Amendment jurisprudence. On appeal of this decision, the Court of Appeals disagreed.[4] The court determined that the Commission failed to demonstrate that its opt-in

[1] Verizon Petition for Reconsideration of the Third Report and Order in CC Docket No. 96-115 (Oct. 21, 2002).

[2] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, *Third Report and Order*, 17 FCC Rcd 14860 (2002) (*Third Report and Order*).

[3] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115*, Second Report and Order*, 13 FCC Rcd 8061 (1998) (*Second Report and Order*).

[4] *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (June 5, 2000).

approach was narrowly tailored to serve the government interest and thus concluded that the opt-in approach did not survive constitutional scrutiny.[5] Based on these findings, the Commission initiated a further proceeding to reevaluate CPNI approval mechanisms.

In the *Third Report and Order*, the Commission adopted an opt-out regime,[6] permitting carriers to use and share CPNI on an intra-company basis upon securing opt-out consent.[7] In so doing, the Commission expressly rejected the opt-in approach and did so for good reason. The Commission correctly concluded that an opt-in approach is more extensive and burdensome than necessary to serve the government interest in protecting consumer privacy, and thus would run afoul of carriers' First Amendment right to market their products and services.[8] Further, the Commission concluded that an opt-in approach would undermine customer expectations because consumers reasonably expect that their carriers will use their CPNI to inform them of "their own telecommunications services and products, as well as those of their affiliates."[9] In short, the Commission concluded, based on the record, that the opt-out approval mechanism is not only the best method to balance consumer and carrier interests, but the only *permissible* way to do so under the First Amendment.

Despite these findings, the Commission declined to preempt potentially conflicting state regulations, concluding that it would exercise its preemption authority on a case-by-case basis.[10] Further, the Commission eliminated its presumption that more stringent state CPNI requirements

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[5] *Id.,* at 1236-40.

[6] Under an opt-out approval mechanism, the carrier must notify the customer of its CPNI rights and the customer has to contact the carrier to restrict use or disclosure of its CPNI.

[7] Specifically, carriers can share CPNI with the following: (1) affiliates providing communications-related services, (2) agents, (3) independent contractors and (4) joint venture partners.

[8] *Third Report and Order*, at ¶¶ 30-44.

[9] *Id.,* at ¶ 36.

[10] *Id.,* at ¶ 69.

would be vulnerable to preemption.[11] Both determinations were wrong and should be revisited as they undermine federal policy goals.

In refusing to preempt, the Commission posited that the states might, on a different record, find some permissible basis upon which to order opt-in.[12] That seems highly unlikely. The constitutionality of an opt-in approval mechanism already has been considered exhaustively. After the Commission initially ordered opt-in, the D.C. Court of Appeals concluded that the approach raised serious constitutional concerns. Specifically, the Court expressed doubt as to whether the Commission had sufficiently demonstrated that its interests in protecting the privacy of consumer information and fostering competition were substantial or that its opt-in regulation directly and materially advanced those interests.[13] Even assuming, arguendo, that the Commission made the foregoing demonstration, the court concluded that the Commission did not show that its opt-in rules were narrowly tailored.[14]

Following the Court's findings, the Commission initiated a further proceeding to reevaluate whether an opt-in mechanism could survive constitutional scrutiny. The Commission received comments from every segment of the industry: carriers, consumers, consumer groups and state commissions. The commenters discussed at length the opt-in and opt-out approval mechanisms, many arguing strenuously for adoption of the opt-in approach. Despite the record, the Commission concluded that it could not sustain the opt-in approach under the First Amendment. Given this fact, there is no reason for the Commission to expect that any state could produce a different result. The Commission must not play fast and loose with these constitutional findings. As record after record has shown, opt-in CPNI consent for intra-company CPNI use is not permissible under the First Amendment and any state rules requiring such approval must be preempted.

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[11] *Id.,* at ¶ 70.

[12] *Id.*

[13] *U.S. West v. FCC*, at 1236-40.

[14] *Id.*, at 1239.

Importantly, Verizon is not asking the FCC to preempt state regulations in a vacuum. Rather, Verizon is asking that the FCC only preempt state rules that are clearly inconsistent with federal rules, most notably state rules that require carriers to obtain opt-in approval for intra-company use of CPNI. SBC believes that this preemption request is specific and self - explanatory, rendering Commission review of any state-specific opt-in requirement wholly unnecessary.

Notwithstanding, should the Commission forego exercise of its preemption authority as outlined above, the Commission, at a minimum, should reinstate its presumption that more restrictive state CPNI requirements would be vulnerable to preemption. Having concluded, based on the record, that an opt-out mechanism would appear to be the only legally permissible way to regulate intra-company use of CPNI, it seems counter-intuitive for the Commission to have increased the states' latitude to reach the opposite conclusion.

Respectfully Submitted,

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